RECORD AND BRIEFS

No. 16-341

Supreme Court, U.S.
FILED
MAR 8 2016
OFFICE OF THE CLERK

In the
Supreme Court of the United States

TC HEARTLAND LLC,
Petitioner,

v.

KRAFT FOODS GROUP BRANDS LLC,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF OF *AMICUS CURIAE* PAPOOL S. CHAUDHARI IN SUPPORT OF RESPONDENT KRAFT FOODS GROUP BRANDS LLC AND AFFIRMANCE

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Interest of the *Amicus Curiae*[1]

Papool S. Chaudhari is a sole practitioner who resides and practices in the Eastern District of Texas. *Amicus* has over 13 years of experience in patent litigation matters, having represented both plaintiffs and defendants. *Amicus* is admitted to practice law in the States of Texas, California, Missouri, and the following Federal Courts: The Eastern, Northern, Western and Southern Districts of Texas; the Northern, Central and Eastern Districts of California; the Court of Appeals for the Federal Circuit; and the Supreme Court of the United States.

Petitioner and its *Amici* have improperly attempted to make the case at bar a referendum on patent infringement suits being filed in the Eastern District of Texas. Although this is not actually the subject of the case at bar, given the extent to which Petitioner and its *Amici* have referenced the Eastern District of Texas, *Amicus* respectfully submits that it is appropriate for an actual practitioner in the Eastern District of Texas to submit an *amicus curiae* brief.

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[1] Pursuant to S. Ct. R. 37.6, *Amicus Curiae* represents that he authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *Amicus*, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to S. Ct. R. 37.3(a), *Amicus Curiae* represents that Petitioner filed a general consent to the filing of *amici curiae* briefs, that Respondent consented to the filing of this brief, and that a copy of Respondent's consent is being filed with this brief.

Summary of Argument

1. The plain reading of 28 U.S.C. § 1391(c) and 28 U.S.C. § 1400(b) unambiguously provide that any patent infringement action can be brought where a District Court has personal jurisdiction over the defendant. "Our precedents make clear that the starting point for our analysis is the statutory text." *Desert Palace, Inc. v. Costa*, 530 U.S. 90, 98 (2003) (citing *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-254 (1992)). "And where, as here, the words of statute are unambiguous, the '**judicial inquiry is complete.**'" *Desert Palace*, 530 U.S. at 98 (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)) (emphasis added).

The current and applicable 28 U.S.C. § 1391(c), on its face, applies to *all* venue purposes and deems that a defendant resides in any judicial district where the court has personal jurisdiction over the defendant. 28 U.S.C. § 1400(b) unambiguously does two things. In the first clause of § 1400(b), it reiterates the rule from 28 U.S.C. § 1391(c)(2), namely that a patent infringement suit, just as any other civil action, *may* be brought in a judicial district where the defendant resides, with "resides" being mandated by the statute to refer to any judicial district where the court has personal jurisdiction over the defendant for that civil action. The second clause of § 1400(b), regarding the acts of infringement in the regular and established place of business, provides a limited exception to the rule set forth in 28 U.S.C. § 1391(c)(2).

These statutes as currently written are unambiguous, and, thus, the judicial inquiry from the Court must end here and the Court must respectfully hold that these statutes are to be as unambiguously applied as they are unambiguously written.

2. Other venue statutes make it clear that 28 U.S.C. § 1400(b) is not the sole exclusive patent venue statute. In using language such as "shall be brought only," "may be brought only," and "shall be brought," 28 U.S.C. §§ 1398, 1399 and 1403 unambiguously require that those actions be brought in specific judicial districts. In sharp contrast, 28 U.S.C. § 1400(b) does not use the phrases "may be brought only," "shall be brought only," or "must." Instead it only uses the word "may," which is not compulsory or exclusive language.

If Congress intends for 28 U.S.C. § 1400(b) to be the exclusive patent venue statute, then Congress, and Congress alone, can change the wording to use "shall" or "may be brought only in," as it has done with these other venue statutes. Currently, however, this is not the case with 28 U.S.C. § 1400(b). Even if Congress changes the language in 28 U.S.C. § 1400(b) to make it the sole exclusive patent venue statute, 28 U.S.C. § 1400(b) contains no definition of "resides," and 28 U.S.C. § 1391(c) still reads "for all venue purposes." Thus, merely amending the wording to "shall" or "may be brought only in" changes nothing, but Congress has the power to completely re-write 28 U.S.C. § 1391(c) and 28 U.S.C. § 1400(b) if it so chooses. That is a power exclusively held by Congress, however, not, respectfully, the Court.

3. The *Fourco* and *VE Holding* decisions have no relevance or applicability here, and, thus, must be disregarded. As neither of these cases conducted a statutory analysis of both 28 U.S.C. § 1391(c)(2) and 28 U.S.C. § 1400(b) as they are written today, these cases should be disregarded by the Court.

Rather than begin with analysis of the text and end when the language is unambiguous, Petitioner and its *Amici* advocate that the Court begin with case law that analyzed outdated versions of the statutes, and then claim that the doctrine of *stare decisis* compels the Court to interpret the current version of the statutes in accordance with the outdated case law. This is a fundamental contradiction with how this Court conducts statutory interpretation. "We have said time and again that courts must presume a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank*, 503 U.S. at 253-54 (citing, e.g., *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241-242 (1989); *United States v. Goldenberg*, 168 U.S. 95, 102-103 (1897); *Oneale v. Thornton*, 6 Cranch 53, 68 (1810)). Holding that decisions analyzing outdated versions of statutes trump the unambiguous language of current Laws of the United States—"the supreme Law of the Land"—arguably violates the Supremacy Clause. U.S. Const., art. VI, cl. 2.

Were the Court to hold that its 1957 decision in *Fourco* applied to the current versions of 28 U.S.C. § 1391(c)(2) and 28 U.S.C. § 1400(b), this would mean that the Congressional amendments to the statutes in 1988 and 2011 have zero meaning and effect. It would, in essence, mean that the Court is inserting itself into the legislative process by overruling the

actions of Congress in favor of its own analysis that was conducted on outdated versions of the statutes. It would revert 28 U.S.C. § 1391(c)(2) and 28 U.S.C. § 1400(b) to their 1957 versions, and override the Congressional amendments of 1988 and 2011. Such legislative action is not within the power of the Court as granted by Article III of the Constitution.

4. The 2011 Amendments did nothing to establish that the outdated *Fourco* decision is somehow good law today. Petitioner makes the argument that because the 2011 Congressional amendments including a "harmonizing" provision in 28 U.S.C. § 1391(a), that this represents Congress' recognition of *Fourco* as controlling law in the realm of patent venue. Petitioner argues that "law," as mentioned in the statute, also refers to common law, and, thus, *Fourco*. *See* Petitioner's Brief at 39-42.

This analysis, however, is flawed. It wholly ignores the fact that Congress amended these venue statues in 1988. In 1988, 28 U.S.C. § 1391(c) was amended as follows:

> **For the purposes of venue under this chapter,** a defendant that is a corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced . . . .

28 U.S.C. § 1391(c) (1988), Judicial Improvements and Access to Justice Act, Pub. L. 100-702 § 1013, 102 Stat. 4642, 4669 (1988) (emphasis added). As there is no question that 28 U.S.C. § 1400 is in the same chapter as 28 U.S.C. § 1391, the 1988 amendments clearly set forth that residency for patent infringement suits was governed by the 1988 28

U.S.C. § 1391(c). Therefore, this 1988 amendment overruled *Fourco*, which Congress is permitted to do in regards to statutory questions.

Even if it was accepted that 28 U.S.C. § 1400(b) is a "special venue rule that governs under [a] particular Federal statute", as discussed above, the statute on its face reiterates the rule from 28 U.S.C. § 1391(c) in its first clause using the suggestive word "may" and itself references the term "resides" which is defined by § 1391(c), and then codifies a special exception to that general rule in the second clause. Nowhere is the 1957 *Fourco* holding, having already been nullified by the 1988 amendments, somehow resurrected by the "harmonizing" provision of current 28 U.S.C. § 1391(a).

5. Public Policy arguments for how the laws should read must be directed to Congress, not the Court. Much of the argument made by Petitioner and its *Amici* focuses on public policy, and in specific, the alleged "problem" of too many patent infringement suits being filed in the Eastern District of Texas. This Court is an Article III court of extremely limited jurisdiction. The case at bar only concerns answering the narrow question of whether this case should proceed in Delaware or Indiana through a statutory analysis of the current 28 U.S.C. § 1391(c)(2) and 28 U.S.C. § 1400(b). Since the language of these statutes is unambiguous, the judicial inquiry must end there. The Court lacks authority to resolve the question of whether too many patent infringement suits are filed in the Eastern District of Texas. The Court *only* has authority under Article III of the Constitution to adjudicate the "case or controversy" between the Petitioner and Respondent, and nothing else. *Amicus*

submits, and respectfully suggests, that the Court use this case as a prime example of cases that should never end up before this Court and to remind Petitioner and its *Amici* that their concerns regarding patent venue reform are more appropriately taken up with Congress.

Argument

Despite the rhetoric from Petitioner and its *amici*, the case at bar is not *Fortune 500 Corporations and the Electronic Frontier Foundation*[2] *v. The Eastern District of Texas*. The case that has invoked this Court's limited Article III jurisdiction, *TC Heartland LLC v. Kraft Foods Brands Group LLC*, concerns a narrow venue dispute regarding the statutory interpretation, application and effect of the current statutes 28 U.S.C. § 1391(c) and 28 U.S.C. § 1400(b). Under a plain reading of these current statutes, *Amicus* respectfully submits that the Court can come to no other decision but to affirm the holding of the Court of Appeals of the Federal Circuit.

I. The plain reading of 28 U.S.C. § 1391(c) and 28 U.S.C. § 1400(b) unambiguously provide that any patent infringement action can be brought where a District Court has personal jurisdiction over the defendant

This Court has long held that any statutory analysis must begin with the very words of the statute(s) themselves and must end with the words if the words are clear. "Our precedents make clear that the starting point for our analysis is the statutory text." *Desert Palace, Inc. v. Costa*, 530 U.S. 90, 98

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[2] *Amicus curiae* briefs make for strange bedfellows.

(2003) (citing *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-254 (1992)). "And where, as here, the words of statute are unambiguous, the **'judicial inquiry is complete.'**" *Desert Palace*, 530 U.S. at 98 (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)) (emphasis added).

The applicable current 28 U.S.C. § 1391(c)(2) reads as follows:

> (c) Residency. –For **all** venue purposes—
>
> > (2) an entity with the capacity to sue and be sued in its common name under applicable law, whether or not incorporated, shall be deemed to reside, if a defendant, in any judicial district in which such defendant is subject to the court's personal jurisdiction with respect to the civil action in question, and, if a plaintiff, only in the judicial district in which it maintains its principal place of business.

28 U.S.C. § 1391(c)(2) (emphasis added). This statute unambiguously provides that for *all* venue purposes, a defendant is deemed to "reside" in any judicial district where a court has personal jurisdiction over that defendant in regards to that particular civil action.

The applicable current 28 U.S.C. § 1400(b) reads as follows:

> (b) Any civil for patent infringement **may** be brought in the judicial district where the defendant **resides**, or where the defendant has committed acts of infringement and has a regular and established place of business.

28 U.S.C. § 1400(b) (emphasis added). This statute unambiguously states two things. The first clause states that patent infringement actions *may* be brought in the judicial district where the defendant *resides*, and the second adds an exception that the defendant may also be sued for patent infringement in any district where it has committed acts of infringement and has a "regular and established place of business."

28 U.S.C. § 1400(b) unambiguously does two things. In the first clause of § 1400(b), it reiterates the rule from 28 U.S.C. § 1391(c)(2), namely that a patent infringement suit, just as any other civil action, may be brought in a judicial district where the defendant resides, with "resides" being mandated by the statute to refer to any judicial district where the court has personal jurisdiction over the defendant for that civil action. The second clause of § 1400(b), regarding the acts of infringement in the regular and established place of business, provides a limited exception to the rule set forth in 28 U.S.C. § 1391(c)(2).

How these two statutes as currently written work to govern patent venue is best explained in an example: Consider a widget manufacturer ("Widget Corporation"), a Missouri Corporation with only one office, its principal place of business, located in St. Joseph's, Missouri. Every Saturday, Widget Corporation sends several salespersons to Topeka, Kansas, to sell widgets at a booth at the local Farmer's Market. WidgetsRUs LLC ("WidgetsRUs") is another entity that owns patents covering widgets and comes to learn of Widget Corporation's infringing manufacture and sales. WidgetsRUs has decided to

sue Widget Corporation for patent infringement, and is considering where to sue them.

Under 28 U.S.C. § 1391(c)(2), and the first clause of 28 U.S.C. § 1400(b), Widget Corporation may be sued in federal district court in Missouri, because Widget Corporation, being a Missouri Corporation with a Missouri Principal Place of Business, is without question subject to the personal jurisdiction of the Missouri federal court, and thus, "resides" in Missouri for venue purposes.

But what of suing Widget Corporation in the District of Kansas? The company is likely not subject to personal jurisdiction in Kansas, so the company likely cannot sued in Kansas under 28 U.S.C. § 1391(c)(2), or the first clause of 28 U.S.C. § 1400(b). The second clause of 28 U.S.C. § 1400(b), however, allows for patent infringement suits in judicial districts where the defendant has committed acts of infringement and has a regular and established place of business. Under this part of the statute, Widget Corporation might be able to be sued in Kansas federal court, if their weekly Farmer's Market stand (where they sell the infringing widgets) is deemed to be "a regular and established place of business."

The point of the example is that it illustrates precisely what the currently written 28 U.S.C. § 1391(c)(2) and 28 U.S.C. § 1400(b) unambiguously do on their face. And given that these statutes as currently written are unambiguous, the judicial inquiry from the Court must end here and the Court must respectfully hold that these statutes are to be as unambiguously applied as they are unambiguously written.

II. Other venue statutes make it clear that 28 U.S.C. § 1400(b) is not the sole exclusive patent venue statute

Not only is there unambiguously nothing in the text of 28 U.S.C. § 1400(b) that makes the statute operate as the sole exclusive patent venue statute, but a simple comparison of 28 U.S.C. § 1400(b) to other select venue statutes demonstrates that, on its face, 28 U.S.C. § 1400(b) is not an exclusive venue statute.

For example, 28 U.S.C. § 1398 reads:

> (a) Except as otherwise provided by law, a civil action brought under section 1336(a) of this title **shall be brought only** in a judicial district in which any of the parties bringing the action resides or has its principal office.
>
> (b) A civil action to enforce, enjoin, set aside, annul, or suspend, in whole or in part, an order of the Interstate Commerce Commission made pursuant to the referral of a question or issue by a district court or by the United States Court of Federal Claims, **shall be brought only** in the court which referred the question or issue.

(emphasis added).

As another example, 28 U.S.C. § 1399 reads:

> Any civil action by any tenant in common or joint tenant for the partition of lands, where the United States is one of the tenants in common or joint tenants, **may be brought**

> **only** in the judicial district where such lands are located or, if located in different districts in the same State, in any of such districts.

(emphasis added).

Finally, 28 U.S.C. § 1403 reads:

> Proceedings to condemn real estate for the use of the United States or its departments or agencies **shall be brought** in the district court of the district where the land is located or, if located in different districts of the same State, in any of such districts.

(emphasis added).

In using language such as "shall be brought only," "may be brought only," and "shall be brought," 28 U.S.C. §§ 1398, 1399 and 1403 unambiguously require that those actions be brought in specific judicial districts. In sharp contrast, 28 U.S.C. § 1400(b) does not use the phrases "may be brought only," "shall be brought only," or "must." It only uses the word "may," which is not compulsory or exclusive language.

The question presented in this case is as follows: "Whether 28 U.S.C. § 1400(b) is the sole and exclusive provision governing venue in patent infringement actions and is not to be supplemented by 28 U.S.C. § 1391(c)?" How can 28 U.S.C. § 1400(b) be the sole and exclusive provision governing venue in patent cases when 28 U.S.C. § 1400(b) unambiguously contains no "exclusive" language and there are other venue statutes discussed above that actually do employ such exclusive language? Congress has made it clear by the plain text that 28 U.S.C. §§ 1398, 1399 and 1403 are exclusive venue statutes and 28 U.S.C. § 1400(b) is not.

If Congress intends for 28 U.S.C. § 1400(b) to be the exclusive patent venue statute, then Congress, and Congress alone, can change the wording to use "shall", "must", or "may be brought only in", as it has done with these other venue statutes. Currently, however, this is not the case with 28 U.S.C. § 1400(b).

Even if Congress changes the language in 28 U.S.C. § 1400(b) to make it the sole exclusive patent venue statute, 28 U.S.C. § 1400(b) contains no definition of "resides," and 28 U.S.C. § 1391(c) still reads "for all venue purposes." Federal Courts have consistently applied this to other specialized venue statutes. *See Aucoin v. Prudential Ins. Co. of Am.*, 959 F. Supp. 2d 185, 190 (D.D.C. 2013) (reading § 1391(c)'s definition of residence into 29 U.S.C. § 1132(e)(2), a special venue statute for ERISA actions); *Virts v. Prudential Life Ins. Co.*, 950 F. Supp. 2d 101, 105 (D.D.C. 2013) (same); *McHenry v. Astrue*, No. 12-2512-SAC, 2012 WL 6561540, at *2 (D. Kan. Dec. 14, 2012) (holding that because 42 U.S.C. § 405(g), a special venue statute for social security actions, does not define "resides," "the court will look to 28 U.S.C. § 1391, which governs the venue of all civil actions brought in federal court"). Thus, merely amending the wording to "shall", "must", or "may be brought only in" changes nothing, but Congress has the power to completely re-write 28 U.S.C. § 1391(c) and 28 U.S.C. § 1400(b) if it so chooses. That is a power exclusively held by Congress—not, respectfully, this Court.

III. The *Fourco* and *VE Holding* decisions have no relevance or applicability here, and, thus, must be disregarded

Petitioner and its *Amici* focus on this Court's holding in *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222 (1957), and likewise, Respondent focuses on the Federal Circuit's holding in *VE Holding Corp. v. Johnson Glass Appliance Co.*, 917 F.2d 1574 (Fed. Cir. 1990). Since neither of these cases conducted a statutory analysis of both 28 U.S.C. § 1391(c)(2) and 28 U.S.C. § 1400(b) as they are written today,[3] the holdings in these decisions, and the rationale used, have no applicability here.

As noted above, statutory analysis begins with the text and if the words are unambiguous, "the judicial inquiry is complete." *Desert Palace*, 530 U.S. at 98 (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)). Since, as discussed in Section I, *supra*, the current 28 U.S.C. § 1391(c)(2) and 28 U.S.C. § 1400(b) are clear and unambiguous, that necessarily must be the end of the judicial inquiry. *Fourco* and *VE Holding* are necessarily inapplicable to the statutory analysis of 28 U.S.C. § 1391(c)(2) and 28 U.S.C. § 1400(b) because they did not consider the statutes as they currently read today.

Petitioner and its *Amici*, in essence, are asking the Court to change how it interprets statutes. Rather than start with analysis of the text and end when the language is unambiguous, Petitioner and

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[3] Although the text of 28 U.S.C. § 1400(b) was the same as it was in the *Fourco* case, 28 U.S.C. § 1391(c)(2) has been amended several times since the *Fourco* decision, and has also been amended following the *VE Holding* decision.

its *Amici* advocate that the Court **begin** with case law that analyzed outdated versions of the statutes, and then claim that the doctrine of *stare decisis* compels the Court to interpret the current version of the statutes in accordance with the outdated case law.[4] This is not only improper, but it makes a mockery of the Court, the judicial process, and the legislative process. Statutes are legislative action that say what they mean, and mean what they say. "We have said time and again that courts must presume a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank*, 503 U.S. at 253-54 (citing, e.g., *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241-242 (1989); *United States v. Goldenberg*, 168 U.S. 95, 102-103 (1897); *Oneale v. Thornton*, 6 Cranch 53, 68 (1810)).

To begin a statutory analysis with case law, especially outdated case law that analyzed an older version of the statutes, would serve to nullify the power and effect of current statutes. Holding that decisions analyzing outdated versions of statutes trump the unambiguous language of current Laws of the United States—"the supreme Law of the Land"—

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[4] "Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done." *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989) (citing, e.g., *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 424 (1986); *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977)). Congress altered the Court's holding in *Fourco* with the 1988 and 2011 amendments to the venue statutes. Thus, the Court is not bound by *stare decisis* here in its statutory interpretation of the current 28 U.S.C. § 1391(c)(2) and 28 U.S.C. § 1400(b).

arguably violates the Supremacy Clause. U.S. Const., art. VI, cl. 2.

Moreover, were the Court to hold that its 1957 decision in *Fourco* applied to the current versions of 28 U.S.C. § 1391(c)(2) and 28 U.S.C. § 1400(b), this would mean that the Congressional amendments to the statutes in 1988 and 2011 have zero meaning and effect. It would, in essence, mean that the Court is inserting itself into the legislative process by overruling the actions of Congress in favor of its own analysis that was conducted on outdated versions of the statutes. It would revert 28 U.S.C. § 1391(c)(2) and 28 U.S.C. § 1400(b) to their 1957 versions, and override the Congressional amendments of 1988 and 2011. Such legislative action is not within the power of the Court as granted by Article III of the Constitution. Again, if Congress wishes engage in such legislative action, it is free to do so. In fact, Congress introduced a bill last year that would restrict the choice of forum for patent infringement suits.[5] This ability to restrict—by legislation—where a patent owner can file suit is, however, beyond the province of the Court.

IV. The 2011 Amendments did nothing to establish that the outdated *Fourco* decision is somehow good law today

Petitioner makes the argument that because the 2011 Congressional amendments including a "harmonizing" provision in 28 U.S.C. § 1391(a), that this represents Congress' recognition of *Fourco* as

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[5] *See* Venue Equity and Non-Uniformity Elimination (VENUE) Act of 2016, S. 2733, 114th Cong.

controlling law in the realm of patent venue. *See* Petitioner's Brief at 39-42.

28 U.S.C. § 1391(a), following the 2011 amendments, reads as follows:

> (a) Applicability of Section. —**Except as otherwise provided by law**—
>
> (1) This section shall govern the venue of all civil actions brought in district courts of the United States; and
>
> (2) The proper venue for a civil action shall be determined without regard to whether the action is local or transitory in nature.

(emphasis added).

Petitioner argues that "law," as mentioned in the statute above, also refers to common law, and, thus, *Fourco*. *See* Petitioner's Brief at 39-42. According to Petitioner, this is Congressional recognition that the *Fourco* decision is good law today. *See id.*

This analysis is flawed. It wholly ignores the fact that Congress amended these venue statues in 1988. In 1988, 28 U.S.C. § 1391(c) was amended as follows:

> **For the purposes of venue under this chapter,** a defendant that is a corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced
>
> . . . .

28 U.S.C. § 1391(c) (1988), Judicial Improvements and Access to Justice Act, Pub. L. 100-702 § 1013, 102 Stat. 4642, 4669 (1988) (emphasis added). As there is no question that 28 U.S.C. § 1400 is in the same chapter as 28 U.S.C. § 1391, the 1988 amendments clearly set forth that residency for patent infringement suits was governed by the 1988 28 U.S.C. § 1391(c). Therefore, this 1988 amendment overruled *Fourco*, which Congress is permitted to do in regards to statutory questions.[6]

When Congress amended these statutes again in 2011, the addition of "[e]xcept as otherwise provided by law" in 28 U.S.C. § 1391(a) did nothing to bring back the *Fourco* decision, because the *Fourco* decision had not been good law since at least 1988.

Petitioner notes that there is one legislative report on the 2011 act and it reads as follows:

> New paragraph 1391(a)(1) would follow current law in providing the general requirements for venue choices, but would not displace the special venue rules that govern under particular Federal statutes.

H.R. REP. NO. 112-10, at 18 (2011); Petitioner's Brief at 39. This House Report indicates that "except as otherwise provided by law" in the newly enacted version of 28 U.S.C. § 1391(a) referred to a list of

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[6] Indeed, Petitioner asserts "[u]nder this Court's precedents, *Fourco*'s interpretation of § 1400(b) remained good law in 2011 because it had never been overruled by this Court." Petitioner's Brief at 41. In making this assertion, Petitioner fails to appreciate that Congress can, and did, overrule the *Fourco* decision with the 1988 amendment to 28 U.S.C. § 1391(c). *See* footnote 4, *supra*.

statutes complied by the American Law Institute,[7] which notably did not include 28 U.S.C. § 1400(b). AMERICAN LAW INSTITUTE, FEDERAL JUDICIAL CODE REVISION PROJECT 253-90 (2004).

Even if it was accepted that 28 U.S.C. § 1400(b) is a "special venue rule that governs under [a] particular Federal statute",[8] as discussed above, the statute on its face reiterates the rule from 28 U.S.C. § 1391(c) in its first clause using the suggestive word "may", references the term "resides" which is defined by § 1391(c), and then codifies a special exception to that general rule in the second clause. *See* Section I, *supra*. Nowhere is the 1957 *Fourco* holding—having already been nullified by the 1988 Congressional amendments—somehow resurrected by the "harmonizing" provision of current 28 U.S.C. § 1391(a).

V. Public Policy arguments for how the laws should read must be directed to Congress, not the Court

Much of the argument made by Petitioner and its *Amici* focuses on public policy, specifically the alleged "problem" of too many patent infringement suits being filed in the Eastern District of Texas. *Amicus* suspects that this is because Petitioner and its *Amici*

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[7] H.R. REP. NO. 112-10 at 16 n.8 (2011).

[8] This is not clear given that 28 U.S.C. § 1400(b) uses the word "may," and not "shall," or "may be brought only in," as used in 28 U.S.C. §§ 1398, 1399 and 1403. *See* Section II, *supra*. Arguably the harmonizing provision of 28 U.S.C. § 1391(a) in the 2011 amendments is a reference to these specific venue statutes, noting that 28 U.S.C. §§ 1398, 1399 and 1403 are not to be disturbed by the 2011 amendments to 28 U.S.C. § 1391(c), which makes perfect sense under a plain reading of these statutes and the amendments thereto.

are so well aware of how unambiguous the current versions of 28 U.S.C. § 1391(c)(2) and 28 U.S.C. § 1400(b) are, that they would rather try to make a public policy argument for why the Court should deviate from the established principles of statutory interpretation (as well as why the Court should arguably violate the Supremacy Clause) in holding that outdated, overruled case law from 1957 trumps the supreme Law of the Land—current statutes that have been amended several times since 1957.

Amicus provides no opinion here of how compelling these public policy arguments might be. Perhaps the arguments are compelling. Perhaps too many patent infringement actions are filed in the Eastern District of Texas. Perhaps every federal district judge in the United States should have complex patent infringement cases taking over their docket, instead of those cases being concentrated in a few judicial districts. The appropriate forum to discuss these questions is, however, Congress, not this Court.

This Court is an Article III court of extremely limited jurisdiction. The case at bar only concerns whether Petitioner can be sued for patent infringement in Delaware or if Petitioner must be sued in Indiana. The case at bar only concerns answering that narrow question through a statutory analysis of the current 28 U.S.C. § 1391(c)(2) and 28 U.S.C. § 1400(b). Since the language of these statutes is unambiguous, the judicial inquiry must end there. *Desert Palace*, 530 U.S. at 98. The Court lacks authority to resolve the question of whether too many patent infringement suits are filed in the Eastern District of Texas. The Court also lacks authority to make a determination as to where patent

infringement suits should be filed. The Court only has authority under Article III of the Constitution to adjudicate the "case or controversy" between the Petitioner and Respondent, and nothing else. This principle has been well established by the Court for hundreds of years:

> In 1793, President George Washington sent a letter to Chief Justice John Jay and the Associate Justices of the Supreme Court, asking for the opinion of the Court on the rights and obligations of the United States with respect to the war between Great Britain and France. The Supreme Court politely—but firmly—refused the request, concluding that "the lines of separation drawn by the Constitution between the three departments of the government" prohibit the federal courts from issuing such advisory opinions. 3 Correspondence and Public Papers of John Jay 486-489 (H. Johnston ed. 1890-1893).
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> That prohibition has remained "the oldest and most consistent thread in the federal law of justiciability." *Flast v. Cohen*, 392 U.S. 83, 96, 88 S. Ct. 1942, 20 L. Ed. 2d 947 (1968) (internal quotation marks omitted). And for good reason. **It is derived from Article III of the Constitution, which limits the authority of the federal courts to the adjudication of "Cases" or "Controversies."** U.S. Const., Art. III, § 2. The case or controversy requirement is at once an important check on the powers of the Federal Judiciary and the source of those powers.

See Campbell-Ewald Co. v. Gomez, 136 S. Ct. 663, 678 (2016) (Roberts, C.J., dissenting) (emphasis added).

Amicus submits and respectfully suggests that the Court use the case at bar as a prime example of cases that should never end up before this Court, because it is a waste of this Court's limited resources to hear a case concerning a question of statutory interpretation wherein the statutes are unambiguous on their face, and that the Court should also use this case to remind Petitioner and its *Amici* that their battle for patent venue reform is more appropriately taken up with Congress.

Conclusion

The current versions of 28 U.S.C. § 1391(c)(2) and 28 U.S.C. § 1400(b) unambiguously, on their face, permit the filing of patent infringement suits in any judicial district where the court has personal jurisdiction over the defendant in regards to that civil action. Thus, the Court's judicial inquiry must end there and *Amicus* respectfully urges the Court to affirm the holding of the Federal Circuit, while also holding that Congress has legislatively overruled *Fourco*, and superseded *VE Holding*.

Respectfully submitted,

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March 8, 2017